IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.76 OF 2007
WITH
CIVIL APPLICATION NO.113 OF 2007

Surendra Shantilal Kothari. ..Appellant.

V/s.

Krishna Haribhau Lohokare. ..Respondent.

Mr.R.D.Soni i/b. M/s. Ram & Co. for appellant.

Mr.R.B.Jagtap for Respondent.

CORAM: A.M.KHANWILKAR,J

DATE : MARCH 8, 2007.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Jagtap waives notice for respondent.

4. As short question is involved, appeal is taken up forthwith for final disposal, by consent.

5. This appeal from order takes exception to the Judgment and Order dated 19th December, 2006 passed by the Civil Judge, Sr.Division, Pune below Exh.5 in S.C.Suit No.845 of 2006. The appellant filed suit

for specific performance. During the pendency of the Suit, the appellant took out application Exh.5 for grant of interim relief restraining the respondent from alienating the suit property and/or creating third party interest therein. The said application has been rejected by the trial Court mainly on the finding that the appellant claims right in respect of the suit property through respondent. The respondent itself has limited right therein in terms of Development Agreement dated 1st October, 2001. If it is a development agreement, the appellant will not be entitled for any relief. If this finding is correct, then the conclusion reached by the trial Court of rejecting prayer for interim relief will have to be upheld.

6. However, even on fair scrutiny of the Judgment of the trial Court, it is not possible to take the view that the trial Court has analysed the efficacy of the development agreement dated 1st October, 2001, with particular reference to different clauses of agreement before reaching the conclusion that it is a development agreement. Merely because of nomenclature of the agreement as development agreement, the transaction need not necessarily be a development agreement. However, that aspect has not

been considered by the trial Court at all.

7. Instead of entering into that controversy- as to whether the agreement dated 1st October, 2001 is a development agreement- for the first time before this Court, it is appropriate that the parties are relegated before the trial Court, who in turn shall examine rival contentions and record appropriate finding on its own merits.

8. Accordingly, this appeal succeeds. Impugned Judgment and Order is set aside. Instead, the application Exh.5 is restored to file of the trial Court, to be heard on its own merits in accordance with the law, especially in relation to the contention whether the agreement dated 1st October, 2001 in favour of the respondent No.1 is a development agreement or otherwise. All questions in that behalf are left open. The parties to appear before the trial Court on 20th March, 2007.

9. In view of the statement made by the counsel for the respondent that the respondent has no intention to deal with the suit property in any manner for the time being, accepting that statement, it is not necessary to pass any further order.

10. Needless to observe that the trial Court will decide the remanded application(Exh.5) uninfluenced by the observations in the impugned Judgment or for that matter present order.

11. In view of the above order, Civil application disposed of accordingly.